No. 76-1192

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

HAROLD BROWN, Secretary of Defense, ET AL.,
*Petitioners,*

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF RESPONDENT UNITED STATES STEEL CORPORATION IN SUPPORT OF THE PETITION AND IN OPPOSITION TO THE MOTION OF THE AMICUS CURIAE

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | 1 |
| Reasons For Granting The Petition | 2 |
| Reasons For Denying *Amicus'* Request That This Court Consider An Additional Question | 12 |
| Conclusion | 17 |
| Appendix | 1a |


## CITATIONS

CASES:


| | |
|---|---|
| *Arco Corp.* v. *Aero Lodge 735*, 390 U.S. 557 | 7 |
| *Benson* v. *GSA*, 298 F. Supp. 590, *appeal pending* (3rd Cir.) | 15 |
| *Charles River Park "A", Inc.* v. *H.U.D.*, 519 F.2d 935 | 5, 8, 9, 10, 11, 12 |
| *Chrysler Corp.* v. *Schlesinger*, 412 F. Supp. 171 | 3, 11 |
| *Consumers Union* v. *Consumer Product Safety Council*, 400 F. Supp. 848 (D.D.C. 1975), *appeal pending* (D.C. Cir.) | 13 |
| *FAA Administrator* v. *Robertson*, 422 U.S. 255 | 5, 6, 7, 8, 9 |
| *Grumman Aircraft Engineer. Corp.* v. *Renegotiation Bd.*, 425 F.2d 578 | 5 |
| *Hughes Aircraft Co.* v. *Schlesinger*, No. 75-1064 (9th Cir.) | 3 |
| *National Parks and Conservation Assoc.* v. *Kleppe*, 547 F. 2d 673 | 7 |
| *National Parks and Conservation Assn.* v. *Morton*, 498 F.2d 765 | 8 |

Page

*Pennzoil Co.* v. *FPC*, 534 F.2d 627 ..... 10

*Provident Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 14

*Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1 ..... 16

*Sears, Roebuck and Co.* v. *GSA*, — F.2d — (D.C. Cir., April 1, 1977) .....4, 7, 8, 12

*Southern Ry. Co.* v. *Madden*, 235 F.2d 198 ..... 17

STATUTES AND ORDERS:

Freedom of Information Act

5 U.S.C. § 552 .....*passim*
5 U.S.C. § 552(a)(3) ..... 15
5 U.S.C. § 552(a)(4)(B) ..... 16
5 U.S.C. § 552(b)(3) .....*passim*
5 U.S.C. § 552(b)(4) ..... 4, 5, 8, 9, 10, 11, 12
18 U.S.C. § 1905 .....*passim*
28 U.S.C. § 1391 ..... 16
28 U.S.C. § 1391(e) ..... 16
28 U.S.C. § 1404 ..... 17
P.L. 94-409, 90 Stat. 1241 (Sept. 13, 1976), § 5(b) ..... 6

RULES AND REGULATIONS:

29 C.F.R. § 70.21 .....9, 1a
29 C.F.R. § 70.71 .....9, 1a
41 C.F.R. Part 60-40 ..... 9
41 C.F.R. § 60-40.3(a)(2) ..... 9
F.R.Civ. P. 19 .....12, 13, 14, 15, 16
F.R.Civ.P. 19(a)(2)(i) ..... 13
F.R.Civ.P. 19(a)(2)(ii) ..... 14



Page

F.R.Civ.P. 19(b) ..... 14
F.R.Civ.P. 24 .....15, 16
F.R.Civ.P. 82 ..... 16
Rule 19(b) of the Supreme Court of the United States 7

MISCELLANEOUS:

Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on S. 921, 85th Cong., 2d Sess. (1958) ..... 6

Report of the House Committee on Government Operations, H.R. Rep. No. 94-880, 94th Cong., 2d Sess. (1976) ..... 6

Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June, 1967 ..... 6

Adv. Committee Comments to Rule 19, 39 C.F.R. 89 (1966) ..... 14

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## BRIEF OF RESPONDENT UNITED STATES STEEL CORPORATION IN SUPPORT OF THE PETITION AND IN OPPOSITION TO THE MOTION OF THE AMICUS CURIAE

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### QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1905 is a statute which specifically exempts matters from disclosure within the meaning of Exemption 3 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3).

2. Whether agency regulations promulgated for the express purpose of implementing the Freedom of In-

formation Act, 5 U.S.C. § 552, constitute "authorization by law" within the meaning of 18 U.S.C. § 1905 for disclosure of private, confidential information.

3. Whether Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), is an absolute bar to disclosure of private, confidential information which falls within that exemption.

4. Whether a government agency may disclose private, confidential information if the information is exempt from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and if disclosure of the information would violate 18 U.S.C. § 1905.

5. Whether a person who has supplied to a government agency private, confidential information which assertedly is exempt from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), or whose disclosure assertedly would violate 18 U.S.C. § 1905 is entitled to a trial *de novo* in a suit to prevent disclosure by the Government of that information.

## REASONS FOR GRANTING THE PETITION

Petitioners accurately state that these cases are representative of a rapidly growing number of "reverse FOIA" actions which have been brought by private parties to enjoin federal government agencies from disclosing, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, confidential information which those parties have submitted to the Government. Petitioners also correctly state that such cases raise important questions concerning the purpose



and nature of the Freedom of Information Act and the Act's exemptions, as well as the extent to which private, confidential information should be protected from public disclosure.[1]

Petitioners have, however, declined to raise a fundamental issue which this Court should consider concerning Exemption 3 of the FOIA. Moreover, in presenting questions for this Court's review Petitioners have not, Respondent believes, adequately framed those questions.

Accordingly, because of the universal agreement as to the importance of these cases and the need for decisive guidance from this Court,[2] Respondent joins in

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[1] The issues presented by these cases are of broad public significance since they affect the disclosability not only of employment information provided to the Government by tens of thousands of government contractors such as Respondents, but also of an endless array of other materials of a confidential and proprietary nature which private parties are asked or compelled to submit to the Federal Government. Those materials, although long maintained in well deserved confidence by the Government, now are, under the construction of the FOIA urged by Petitioners here, threatened to be disclosed to anyone from the well intentioned member of the public to the unscrupulous competitor. Such disclosure portends serious adverse consequences not only to the persons who have furnished the information to the Government, but also to the Government itself whose ability to acquire information from the private sector for implementation of regulatory programs will be impaired if the confidentiality with which the information was initially submitted is not respected.

[2] A number of Circuit Courts are presently awaiting guidance from this Court in order to dispose of pending "reverse FOIA" appeals. In *Hughes Aircraft Co.* v. *Schlesinger*, No. 75-1064 (9th Cir.), the Ninth Circuit has, after oral argument, withdrawn the case from submission pending action by this Court in the instant cases. Similarly, *Chrysler Corp.* v. *Schlesinger*, Nos. 76-1970 and 76-2238 (3d Cir.), has been removed without explanation from the court's argument calendar, presumably to await the

urging that the Court grant the petition for writ of *certiorari*. However, for the reasons stated below, Respondent urges the Court to consider the additional, and reframed, questions presented in this brief.

1. The court of appeals held that 18 U.S.C. § 1905 specifically exempts matters from disclosure within the meaning of Exemption 3 of the FOIA and that, because disclosure of Respondents' documents would violate § 1905,[3] those documents were both exempt from mandatory disclosure under the FOIA and nondisclosable under § 1905. Pet. App. 14a, 26a. In addition, the court of appeals held that, although "disclosure of . . . exempt information is ordinarily discretionary with the agency * * * the exercise of this discretionary power is subject to the restraints imposed by other 'statutes, rules, and regulations' and to any clear declarations of a legislative policy against disclosure as reflected in an exemption of the [Freedom of Information] Act itself";[4] and that Exemption 4 of the FOIA constitutes one such declaration of legislative policy which "confers on a supplier of *private,* confidential commercial information an absolute right to prevent the disclosure of information which falls within Exemption 4." Pet. App. 44a, 41a-42a (emphasis in original).[5]

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outcome of these cases. And in *Sears, Roebuck and Co.* v. *GSA*, — F.2d — (D.C.Cir., April 1, 1977), Slip Op. at 13, the D.C. Circuit has expressly noted the absence of, and need for, "decisive new guidance by the Supreme Court" on some of the very questions raised by Respondent herein.

[3] Petitioners have not challenged the court's finding (Pet. App. 56a) that Respondents' documents consisted of the type of information described in 18 U.S.C. § 1905.

[4] Pet. App. 12a (footnote omitted).

[5] The texts of Exemptions 3 and 4, and 18 U.S.C. § 1905 are set forth at Pet. App. 82a-83a.



Petitioners have expressly declined to seek review of the court of appeals' holding that 18 U.S.C. § 1905 is an Exemption 3 statute. Pet. 16 n. 20. Instead, Petitioners have sought review of the decision below on the grounds, *inter alia,* (1) that, contrary to the court of appeals' decision, government agencies have discretion to disclose information falling within Exemption 4; and (2) that, even though Respondents' documents fall within 18 U.S.C. § 1905, disclosure of those documents does not violate that statute because it is "authorized by law" within the meaning of § 1905 by agency disclosure regulations.

Respondent believes that Petitioners, in declining to seek review of the question whether 18 U.S.C. § 1905 is an Exemption 3 statute, have overlooked the fundamental issue in this case. As the court below noted, there was subsequent to the passage of the FOIA

> "considerable contrariety in the decisions of the District and Circuit Courts on the statutes [including 18 U.S.C. § 1905] properly within the scope of Exemption 3. * * * However, in a consistent lines of cases, beginning with *Grumman Aircraft Engineer. Corp.* v. *Renegotiation Bd.* (1970), 138 U.S. App. D.C. 147, 425 F.2d 578, 580, n. 5, and continuing up to *Charles River Park "A", Inc.* v. *Department of H. & U.D.* (1975), 171 U.S. App. D.C. 286, 519 F.2d 935, 941, n. 7, the District and Circuit Courts of the District of Columbia have held that § 1905 is not among the statutes referred to in § 552(b)(3)." Pet. App. 17a-18a.

Subsequent to the D.C. Circuit's decision in *Charles River Park,* this Court decided *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975). There, the Court held that it was not the intent of Congress in enacting the FOIA to repeal or amend in any way statutes then

"extant" which restrained federal agencies from publicly disclosing information in their files. *Id.* at 263-6. This Court broadly construed Exemption 3 to apply not only to statutes which restricted access to named documents but also to statutes which generally directed government agencies to withhold information. *Id.* at 265-6. In doing so, the Court expressly rejected the construction which previously had been given to Exemption 3 by the D.C. Circuit. Moreover, although *Robertson* did not specifically identify 18 U.S.C. § 1905 as a statute comprehended by Exemption 3, the court of appeals below concluded that "[t]here can be little doubt that § 1905 was among those . . . [statutes] intended to be covered by Exemption 3, to which the Congress and the Court in *Robertson* referred." Pet. App. 24a.[6]

In response to this Court's *Robertson* decision (and prior to the decision of the court below), Congress amended Exemption 3 for the purpose of overruling[7] the precise result reached in *Robertson* insofar as it construed Exemption 3 to comprehend preexisting nondisclosure statutes, such as the FAA statute at issue in *Robertson*, which either (1) failed to establish specific criteria for withholding or (2) committed the decision to withhold to agency discretion. P.L. 94-409, 90 Stat. 1241 (Sept. 13, 1976), § 5(b). The amendment

[6] *See* 1958 Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on S. 921, 85th Cong., 2d Sess. 985-987; and *see* Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June, 1967, at pp. 31-32, which lists § 1905 as one of the most important statutes which Congress intended to preserve under Exemption 3.

[7] Report of the House Committee on Government Operations, H.R.Rep.No. 94-880, 94th Cong., 2d Sess. 23 (1976).



to Exemption 3, however, did not purport to affect other preexisting nondisclosure statutes which met the requirements of particularity contained in amended Exemption 3.[8]

Subsequent to *Robertson* and the amendment to Exemption 3, the court below issued its decision holding that 18 U.S.C. § 1905 *was*, in fact, a statute comprehended by Exemption 3. The court of appeals was of the opinion that this Court's holding in *Robertson*, apparently notwithstanding the subsequent amendment to Exemption 3, compelled the conclusion that 18 U.S.C. § 1905 was an Exemption 3 statute. Then, only two weeks later, in the final link of this chain of events, the D.C. Circuit, in *National Parks and Conservation Assoc.* v. *Kleppe*, 547 F.2d 673 (1976), reaffirmed its view that 18 U.S.C. § 1905 *was not* an Exemption 3 statute. *See Sears, Roebuck and Co.* v. *GSA, supra*, Slip Op. at 11.

The holding of the court below is thus directly contrary to the decisions of the D.C. Circuit on this issue, as even the D.C. Circuit itself has recognized,[9] and presents a clear conflict of decisions among the circuit courts which warrants review by this Court. See Rule 19(b) of the Rules of the Supreme Court; *Arco Corp.* v. *Aero Lodge 735*, 390 U.S. 557, 559 (1968). Moreover,

[8] Amended Exemption 3 provides that the FOIA disclosure mandate shall not apply to matters which are "specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . ."

[9] *Sears, Roebuck and Co.* v. *GSA, supra*, Slip. Op. at 11.

this Court's construction of Exemption 3 in *Robertson* is sorely in need of clarification in light of Congress' amendment of that exemption. Finally, resolution of this conflict is fundamental to reverse FOIA cases involving assertedly confidential private information. For if, as Respondent submits, the court of appeals was correct in holding that 18 U.S.C. § 1905 is an Exemption 3 statute, it would be unnecessary for this Court to decide whether Exemption 4 of the FOIA is an absolute bar to disclosure; the Court would reach that question only if it found that § 1905 was not an Exemption 3 statute. The desirability of reviewing the Exemption 3 question first has been expressly noted by the D. C. Circuit in *Sears, Roebuck and Co.* v. *GSA, supra*, where that court stated that, preliminary to a review of information's status under Exemption 4, "the threshold issue now is whether § 1905 is within the now more limited group of statutes described by Exemption 3." Slip Op at. 13.

Accordingly, Respondent submits that the "threshold issue" for review by this Court, should it grant the petition, is whether 18 U.S.C. § 1905 is an Exemption 3 statute.[10]

2. Should the Court conclude that § 1905 is an Exemption 3 statute it will also be necessary for the Court to consider the correlative question of whether

[10] In this context, the Court should also provide guidance as to whether 18 U.S.C. § 1905 is, as stated by the court below (Pet. App. 27a n. 38) and in *Charles River Park* (519 F.2d at 941-2 n.7), merely "coextensive with Exemption 4; or whether, as recently suggested by the D.C. Circuit in *Sears, Roebuck and Co.* v. *GSA*, *supra*, Slip Op. at 13, § 1905 may provide broader protection from disclosure than is presently available under Exemption 4 as that exemption has been construed in *National Parks and Conservation Assn.* v. *Morton*, 498 F.2d 765, 770 (D.C.Cir. 1974).



agency regulations promulgated for the express purpose of implementing the FOIA constitute "authorization by law", within the meaning of 18 U.S.C. § 1905, for the disclosure of confidential information.[11] If, as Respondent submits, such agency regulations do not constitute authorization by law for disclosure within the meaning of §1905,[12] then Respondents' documents would be both exempt from mandatory disclosure under Exemption 3 and nondisclosable under § 1905, as the court of appeals correctly held. Pet. App. 14a, 26a.

3. Should, however, the Court find that 18 U.S.C. § 1905 is *not* an Exemption 3 statute or that Petitioners' disclosure regulations *do* constitute "authorization by law" within the meaning of 18 U.S.C. § 1905 for disclosure of Respondents' confidential information,[13] the Court should then consider whether, as the court of appeals below correctly held, Exemption 4 of

[11] This question, although framed somewhat differently, is presented by Petitioners.

[12] *See Charles River Park* v. *HUD, supra*, 519 F.2d at 942-3. Since Petitioners' disclosure regulations were promulgated for the express purpose of implementing the FOIA, those regulations cannot limit the applicability of a "preexisting nondisclosure" statute such as 18 U.S.C. § 1905 when Congress and this Court in *Robertson* have said that not even the FOIA itself may have that effect. 422 U.S. 263-5.

[13] In any event, the disclosure regulations relied upon by Petitioners (41 C.F.R. Part 60-40) could not authorize disclosure because (1) those regulations, to the extent that they are applied to authorize disclosure of documents which fall within 18 U.S.C. § 1905, conflict with 29 C.F.R. § 70.21 ("by which . . . [Petitioners] admitted they were bound", Pet. App. 25a) and are therefore void and unenforceable under 29 C.F.R. § 70.71 (see Appendix, *infra*); and (2) disclosure would in fact violate 41 C.F.R. § 60-40.3(a)(2) (Pet. App. 85a; *see* Pet. App. 7a, 9a-10a, 56a).

the FOIA constitutes an absolute bar to disclosure of *private*, confidential information which falls within the exemption.[14] Here, too, the decision of the court below conflicts with the Fifth Circuit's decision in *Pennzoil Co.* v. *FPC*, 534 F.2d 627, 630 (1976), and, at least in form if not in substance, with the D.C. Circuit's decision in *Charles River Park, supra*, 519 F.2d at 941,[15] both of which held that, absent other restraints, a government agency has discretion to disclose information which falls within Exemption 4. This issue therefore warrants review by this Court.

In this context, the Court ought to consider whether Congress, although it intended that disclosure of *agency* documents which fall within the FOIA exemptions would ordinarily be discretionary, intended to accord greater protection to *private* confidential commercial information which *private* persons or corporations furnish to the Government, the disclosure of which would be harmful to *private* interests. Respondent submits that, only by recognizing the distinction drawn by Congress between *private* and *agency*

[14] See n. 11, *supra*. Petitioners have not challenged the court of appeals' finding that Respondents' documents fell within Exemption 4 (Pet. App. 56a).

[15] Although the D.C. Circuit has not expressly held that information which falls within Exemption 4 may never be disclosed, that is the implication of its decision in *Charles River Park "A", Inc.* v. *HUD, supra*. There the D.C. Circuit stated that it construed Exemption 4 and § 1905 to be "coextensive"; that is, privately supplied confidential information which falls within Exemption 4 also falls within 18 U.S.C. § 1905. Because the disclosure of such information would violate § 1905 and would, therefore, be an abuse of discretion, under *Charles River Park* no private confidential information which falls within Exemption 4 may be disclosed.



records, can the FOIA's basic disclosure policy *and* the equally important congressional policy underlying the exemptions *both* be given their intended effect. The court below, in contrast to the decisions of the D.C. Circuit, correctly drew this distinction in holding that, regardless of the Government's discretion to disclose *agency* documents, the Government has no discretion to disclose *private* documents which fall within Exemption 4. Pet. App. 41a-52a.

4. In the event this Court decides both that 18 U.S.C. § 1905 is not an Exemption 3 statute and that Exemption 4 does not stand as an absolute bar to disclosure of material which falls within the exemption, the Court should declare whether the Government is, nevertheless, prohibited from disclosing information which falls within Exemption 4 of the FOIA *and* whose disclosure would violate 18 U.S.C. § 1905. This approach has been employed by the courts of the District of Columbia Circuit [16] and was acknowledged, if not expressly employed, by the court below.[17]

5. Finally, Respondent submits that the Court need not consider the second question presented for review by Petitioners: whether judicial review in a reverse FOIA action is limited to review of the administrative record for abuse of discretion. Respondent submits

[16] *E.g., Charles River Park "A", Inc.* v. *HUD, supra*, 519 F.2d at 941-2. See also, *e.g., Chrysler Corp.* v. *Schlesinger*, 412 F.Supp. 171 (D.Del. 1976), *appeal pending*, Nos. 76-1970 and 76-2238 (3rd Cir.)

[17] Although the court of appeals stated that Exemption 4, standing alone, is an absolute bar to disclosure of materials which fall within the exemption, the court, earlier in its opinion, observed that Exemption 4 and 18 U.S.C. § 1905 are "coextensive" and that "material qualifying for exemption under (b)(4) falls within the material, disclosure of which is prohibited by § 1905." Pet. App. 27a n. 38.

that this question is insubstantial for the reasons set forth by the court below (Pet. App. 53a-56a) and by the D.C. Circuit in *Charles River Park "A", Inc.* v. *HUD, supra,* 519 F.2d at 940-1 n. 4,[18] and *Sears, Roebuck and Co.* v. *GSA, supra,* Slip Op. at 4-5; and in light of the fact that no court in the numerous reverse FOIA actions which have to date been brought under Exemption 4 and 18 U.S.C. § 1905 to enjoin disclosure has denied the reverse FOIA plaintiff *de novo* review of its claims.

For the foregoing reasons, Respondent supports the petition for writ of *certiorari* but urges the Court to consider the additional, and reframed, questions set forth by Respondent.

## REASONS FOR DENYING AMICUS' REQUEST THAT THIS COURT CONSIDER AN ADDITIONAL QUESTION

*Amicus* asks this Court to grant *certiorari* on an issue not raised by Petitioners: whether persons who have requested documents pursuant to the FOIA must be joined, pursuant to Rule 19, F.R.Civ.P., as indispensable parties in reverse FOIA cases. *Amicus'* request should be denied.

1. Regardless of the merits of *Amicus'* argument, its request is untimely. The joinder issue should have been raised by *Amicus* at the district court level in the *General Motors* case, either through intervention or, if that method was unacceptable for the reasons stated by *Amicus* (*Amicus'* Brief 12 n. 5), as *amicus curiae.* Failing that, at the very least, the issue should have

[18] "[T]he district court is *not reviewing agency action;* it is making a *threshold determination* whether the plaintiff has any cause of action at all [under either the FOIA or 18 U.S.C. § 1905]." (Emphasis added).



been raised by *Amicus* in the court of appeals as *amicus curiae.* Had *Amicus* followed that orderly procedure, one or both of the lower courts would have passed upon the issue, thereby giving this Court the benefit of their review of the facts and analysis of the legal issues. By delaying, *Amicus* has deprived the Court of that record.

Furthermore, there is a case presently pending in the D.C. Circuit Court of Appeals in which the issue of Rule 19 joinder has been *timely* raised and which would therefore provide a more suitable vehicle than the instant case for review of the joinder issue. In that case, *Consumers Union* v. *Consumer Product Safety Council,* 400 F.Supp. 848 (D.D.C. 1975), *appeal pending,* No. 75-2059 (D.C.Cir.) (argued Sept. 21, 1976), the issue of Rule 19 joinder has been raised both with respect to joinder of the supplier of the documents as a necessary party in an action brought by the requester to compel disclosure; and with respect to joinder of the requester as a necessary party in the related reverse FOIA action brought by the supplier of the documents. In contrast to the instant case, by the time *Consumers Union* comes to this Court on petition for writ of *certiorari,* the issue of Rule 19 joinder will be ripe for decision, having been thoroughly considered below.

2. The question presented by *Amicus* need not be considered becaus it is insubstantial. For, under the criteria of Rule 19, the requester is not an indispensable party to a reverse FOIA suit.

Failure to join the requester does not "as a practical matter impair or impede his ability" (F.R.Civ.P. 19 (a)(2)(i)) to seek to compel release of the documents in question. If the reverse FOIA suit results in an

order requiring disclosure of the documents sought, the requester's interest is fully satisfied. If the suit results in an order to withhold, the requester, since he was not a party to the original suit, will not be collaterally estopped from bringing a new action in his own name to compel production of the documents. *See Provident Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 114, 122 (1968).

Nor does a failure to join the requester mean that those persons already parties will be exposed "to a *substantial* risk" of incurring inconsistent obligations. F.R.Civ.P. 19(a)(2)(ii) (emphasis added). Such a result can occur only if the document supplier successfully concludes a suit to enjoin disclosure, if the requester successfully concludes a suit to compel disclosure, and if those suits are brought in different jurisdictions. This situation has not yet arisen in this case or any other known to counsel and is indeed highly unlikely. Accordingly, Respondent submits that failure to join the requester simply does not create a "substantial" risk of inconsistent obligations within the meaning of Rule 19.

Even if there is a risk that the Government may be subjected to inconsistent obligations as a result of the requester's interest in the documents, this alone does not make the requester an indispensable party. *See* Adv. Committee Comments to Rule 19, 39 FRD 89, 92-93 (1966). Before a person needed for just adjudication can be regarded as an indispensable party, the court must determine that "in equity and good conscience" the action *cannot* proceed in that person's absence. F.R.Civ.P. 19(b). In a reverse FOIA suit, there is no insuperable obstacle to an adjudication without the requesting party for, legally and factually,



the requester's participation will add nothing to the case.[19] Consequently, even without the requster, a court is in a position to afford complete relief among those who are already parties.

3. Finally, it is unnecessary for the Court to consider whether the requester should always be joined under Rule 19 because, in a reverse FOIA action, the requester may intervene pursuant to Rule 24.

Rule 24 allows the requester to decide for himself whether he will participate. This is important in the context of reverse FOIA suits, for routine joinder will not be of significant benefit, and may even be a burden, to the majority of persons who find that their FOIA document requests have precipitated reverse FOIA actions. Many, if not most, requesters have no desire to incur the expenses involved in defending the reverse FOIA suit, and prefer to rely upon the Government to represent their interests. For those who prefer to actively participate in the reverse FOIA suit, no one could seriously challenge their right as an interested party to intervene under Rule 24. Thus, Rule 24 avoids the problem, inevitable if the requester is routinely joined under Rule 19, of bringing before the court parties who have no wish to participate in the litigation and little or nothing to contribute to the disposition of the case.

Rule 24 also avoids the unfair and improper restriction of the reverse FOIA plaintiff's choice of venue

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[19] Disclosure does not depend in any way upon the motive, interest or identity of the requester, since the FOIA requires that information be made available to "any person" unless it is exempt. 5 U.S.C. § 552(a)(3); *see Benson* v. *GSA,* 289 F.Supp. 590, 593 (W.D.Wash. 1968), *aff'd,* 415 F.2d 878 (9th Cir. 1969).

which will result if this Court rules that the requester must be routinely joined under Rule 19.[20] For, if an indispensable party (i.e., the requester) is not subject to the jurisdiction of the court in which the reverse FOIA plaintiff has brought his action, the court in which the action is pending *must* dismiss the case, forcing the reverse FOIA plaintiff to refile his action in a jurisdiction where personal service is available over the requester, and thereby restricting the reverse FOIA plaintiff's broad freedom of choice of venue under 28 U.S.C. § 1391.[21] This result would not generally arise under Rule 24 since a requester intervening

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[20] *Amicus* admits that he intends to bring about this restriction upon the reverse FOIA plaintiff's choice of venue. *Amicus'* Brief 12 n. 5. By seeking Rule 19 joinder, *Amicus* does not simply seek to bring all parties before a single forum, a result within the contemplation of Rule 19, but rather to bring all parties into a forum of *his own choice,* a result not in accordance with the interest of the rule.

[21] This restriction on the reverse FOIA plaintiff's choice of venue violates 28 U.S.C. § 1391(e), which provides that venue under that subsection may be restricted only "as otherwise provided by law." The Federal Rules are not a provision of law within the meaning of the statute. *See* F.R.Civ.P. 82.

If this broad choice of venue is to be restricted and if requesters as a class require special protection in the context of reverse FOIA actions, it is appropriate for Congress, rather than the courts, to act. Congress has shown its concern and ability to deal with the procedural side of FOIA enforcement by providing to the document requester a wide choice of venue under 5 U.S.C. § 552(a)(4)(B) in suits to compel disclosure; if deemed warranted, Congress could enact similar express provisions for venue and joinder in reverse FOIA cases. But, as presently drafted, nothing in the FOIA suggests that Congress intended the wide choice of venue provided to requesters in suits to compel disclosure to result in a restricted choice of venue for the supplier of documents in a reverse FOIA action. *See Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 19-20 (1974).



under that rule cannot force this change of venue upon the original plaintiff.[22]

Accordingly, *Amicus'* request should be denied.

## CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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[22] If there were a real inconvenience in the original plaintiff's choice of forum, the requester could move for a change of venue under 28 U.S.C. § 1404. The disposition of a motion under § 1404 is discretionary, and a court may take into account all relevant factors in ruling upon it, *Southern Ry. Co.* v. *Madden,* 235 F.2d 198 (4th Cir.), *cert. den.*, 352 U.S. 953 (1956), including those which, according to *Amicus,* make it appropriate to give the requester a voice in the choice of forum.

## APPENDIX

The Regulations of the Department of Labor, 29 C.F.R. Part 70, provide in pertinent part:

§ 70.21 Records Not Disclosable.

(a) Pursuant to the provisions of 18 U.S.C. 1905, every officer and employee of the Department of Labor is prohibited from publishing, divulging, disclosing, or making known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with the Department or any agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. No officer or employee of the Department of Labor shall disclose records in violation of this provision of law.

* * *

§ 70.71 Authority of Agency Officials in Department of Labor.

Each agency of the Department of Labor for which an officer or officers have authority to issue rules and regulations may through such officers promulgate supplementary regulations, not inconsistent with this part, governing the disclosure of particular or specific records which are in the custody of that departmental unit. Agencies of the Department which do not or have not promulgated special supplementary regulations governing disclosure of particular records shall disclose such records pursuant only to the provision of Subparts A and B of this Part 70.